Winfield & Jolowicz on Tort, 9th Edition, at page 560 says:

"The [Law Reform (Married Women and Tortfeasors)] Act gives the right to contribution to any 'tortfeasor' who is 'liable' in respect of the plaintiff's damage, and it is given to him only against another 'tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise'. It follows that where a plaintiff, P, has been injured by the concurrent negligence of two defendants, D1 and D2, then if D1 is not liable to P because of some defence open to him the entire loss must be borne by D2."

Salmond on Torts, 12th edition, has this to say at page 90:

"By section 10(1) the Crown is exempt from liability in tort for... personal injury caused by a member of the armed forces when on duty to another member of the armed forces, provided that the latter is... on duty... and the Minister of Pensions certifies that the... injury will be treated as attributable to service for pension purposes. It should be noted that the exemption is extended to the actual wrongdoer himself unless the court is satisfied that the act or omission complained of was not connected with the performance of his duties."

Then in footnote 21 on the same page Salmond adds this:

"Injustice may, however, arise in the not unlikely case of a member of the armed forces being... injured by the combined negligence of a fellow-member of the armed forces and a civilian in circumstances covered by section 10(1). In such a case the civilian will be liable for the whole of the plaintiff's damage without any right of contribution or indemnity from the service tortfeasor."

Here the plaintiff is a soldier, and so is the first third party; it is not disputed that at the time of the accident both the plaintiff and the army driver were on duty as members of the forces; and there is a certificate by the Minister of Finance (exhibit TP2) that the plaintiff's suffering the injury has been treated as attributable to service for the purposes of entitlement to an award under written law relating to the disablement or death of members of the forces of which the plaintiff is a member. It therefore follows that in these circumstances under section 14 of the Government Proceedings Ordinance neither the army driver nor the Government can be held liable in judgment for the injury suffered by the plaintiff.

It is said that in fact the plaintiff is still in the armed forces and has not received any award under the relevant law in respect of the injury, but on the authority of *Adams* v. *War Office*,[14] this does not affect the position, and no doubt the plaintiff will get something from the Government when he eventually leaves the army.

For the above reasons I would dismiss this appeal, with costs. The appellants' deposit to be paid to the respondents against their taxed costs. As there are three respondents I would order $166.67 of the deposit to the plaintiff and the rest to the third parties against taxed costs.

I cannot depart from this case without observing that this appeal was heard exactly seven years to the day after the date of the accident, which delay vividly illustrates the desirability of Government considering whether or not the New Zealand system of compensating victims of road accidents should be introduced into this country. Under that system the plaintiff would have got his money within months without the anxiety and expense involved in having to prove negligence and the courts would have been freed to get on with other work.

Lee Hun Hoe C.J. (Borneo) and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

Solicitors: *Shearn, Delamore* instructed by *Ee, Lim & Leong*, Kuching; *Reddi & Co.*

CHAN KWON FONG & ANOR. v. CHAN WAH

[F.C. (Ali Ag. C.J. (Malaya), Raja Azlan Shah and Wan Suleiman F.JJ.) January 6, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 25 of 1976]

Conflict of Laws — Tort committed abroad — Conditions to be fulfilled for action to lie in Malaysia — Onus of proving that actional wrong under foreign law committed in foreign country.

Tort — Conflict of Laws — Conditions to be fulfilled for action to lie in Malaysia.

In this case the respondent had sued the appellants for damages for injuries sustained in the course of employment arising from an alleged unsafe system of work. The accident took place in Samarinda, Kalimantan, Indonesia. Judgment was given for the respondent and the appellants appealed.

Held: (1) an action for tort will only lie in Malaysia for a wrong alleged to be committed in a country outside Malaysia if two conditions are fulfilled. First the wrong must be of such a character that it would have been actionable if it had been committed in Malaysia. Secondly, it must not have been justifiable by the law of the country where it was committed;

(2) in this case while there was no doubt that the wrong done to the respondent was actionable in Malaysia, there was doubt whether an actionable wrong to Indonesian law had been committed in Indonesia;

(3) the onus of proof that the wrong was actionable in the foreign country was on the plaintiff and as the respondent, who was the plaintiff in the action, had led no evidence on the point, the appeal must be allowed and the claim dismissed.

Cases referred to:-

(1) *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1, 28-29.

(2) *Boys* v. *Chaplin* [1971] A.C. 356.

(3) *Liverpool, Brazil and Ravis Plate Steam Navigation Co. Ltd.* v. *Banham (The Halley)* (1868) L.R. 2 P.C. 193.

(4) *Machado* v. *Fontes* [1897] 2 Q.B. 231, 235.

(5) *Koop* v. *Bebb* (1951) 84 C.L.R. 629.

(6) *Anderson* v. *Eric Anderson Radio and T.V. Pty. Ltd.* (1965) 114 C.L.R. 20, 42.

FEDERAL COURT.

J.G. Bernatt for the appellants.

Shee Koon Ruay for the respondent.

Raja Azlan Shah F.J.: The appellants in this case are the defendants in an action before the High Court in which they are sued by the respondent for damages for injuries sustained in the course of employment arising from an alleged unsafe system of work. By his statement of claim the respondent alleges that the appellants were guilty of negligence in not providing a safe system of work.

Since the accident occurred in Samarinda, Kalimantan, Indonesia, a place outside the jurisdiction of our courts, the question of jurisdiction was in issue. The respondent's cause of action, as the learned trial judge held, arose from the submission of the appellants to the jurisdiction of the court. The appellants had entered unconditional appearance. They took objection but the matter was not pursued at great length and no serious discussion was taken in the court below. They further argued that it was for the respondent to establish that his claim was justifiable and/or actionable in the place where the wrong was committed and it was not for the appellants or the court to establish that the wrong complained of was or was not actionable or justifiable in the place where the wrong was committed. *Phillips* v. *Eyre*[1] and *Boys* v. *Chaplin*[2] were relied upon in support of the proposition. Indeed that was one of the grounds of appeal argued before us. In view of what I am going to say in a moment, I think other considerations relating to the appeal need not at this juncture be gone into.

The respondent is a citizen of Malaysia. The appellants are carrying on business under the name and style of Hon San Timber Co., at No. 149, Jalan Imbi, Kuala Lumpur. The facts are sufficiently stated in the judgment of the learned trial judge. The respondent was employed as a logging lorry driver. Logs were loaded on to his lorry and he was required to drive the lorry from the site of loading to a point of discharge. The loading was done by the use of a bulldozer or tractor which pushed the logs on to the lorry. In order to facilitate this, another log was positioned behind a lorry. The traction was provided by a winch which was part of the lorry. In the course of the loading one of the logs slipped, struck the respondent and inflicted on him injuries which incapacitated him from work for about 15 months, fractured his spine and destroyed one of his kidneys.

The learned trial judge found for the respondent and awarded him $8,000 special damages and $19,000 general damages.

It is necessary, in my view, to ascertain the rule of private international law which defines the conditions of civil liability in this country for an act done abroad. As the law stands it must be accepted that an action of tort will lie in Malaysia for a wrong alleged to be committed in a country outside Malaysia if two conditions are fulfilled. Firstly, the wrong must be of such a character that it would have been actionable if it had been committed in Malaysia. Secondly, it must not have been justifiable by the law of the country where it was committed.

It was Willes J. who expressed the proposition some 100 years ago in *Phillips* v. *Eyre, supra,* a case concerning the jurisdiction of English courts in cases of foreign torts. The first branch of the statement was derived from the decision in *Liverpool, Brazil, and River Plate Steam Navigation Co. Ltd.* v. *Banham ("The Halley")*[3] although in that case the Privy Council held that the defendant was not liable in England for an act done abroad by another defendant, not because of the character of the act according to English law, but because the person who did it was not one for whose defaults the defendant was liable according to English law. This branch of Willes J.'s statement of the law is free from ambiguity. It is the second branch of his statement, expressed by the phrase "not justifiable", that has provoked criticism. The respondent claimed that he needed only to establish the first branch of the rule, not the second. In other words, it is said in order to found jurisdiction in respect of a foreign tort, a plaintiff need only prove that the wrong is of such a character that it is actionable according to the *lex fori,* and if that is established, then it is for the defence to show that the wrong is justified by the *lex loci delicti,* relying on the words of Rigby L.J. in *Machado* v. *Fontes*[4]:

> "I think there is no doubt at all that an action for a libel published abroad is maintainable here, *unless it can be shewn to be justified or excused in the country where it was published;*"

a negative averment, thus falling on the defence to establish it.

Machado v. *Fontes* has been the subject of much criticism ever since its birth. It has been followed in Canada, doubted in the Privy Council, severely criticised in Australia, and not followed in Scotland, where it has long been settled law that "not justifiable" means "actionable". It has also been severely criticised by academic writers (see *Dicey & Morris* in the Conflict of Laws, 9th edition, page 943). In *Machado* v. *Fontes* it was held that if the act was contrary in any respect to the law of that country, then, although it gave rise to no civil liability there, it was not justifiable there, and the second branch of the rule was therefore not established. The High Court in Australia in *Koop* v. *Bebb*[5] rejected *Machado* v. *Fontes* saying that that decision went too far. The House of Lords in *Boys* v. *Chaplin, supra,* at page 377 overruled *Machado* v. *Fontes.* Lord Hodson dealt with the matter in the following words:

> "If the decision in *Machado* v. *Fontes* could be supported on the ground that actionability is not essential the respondent must succeed but, in my opinion, that decision is wrong and should be overruled."

In my opinion, with regard to the choice of law the generally accepted rule is that an act committed abroad is a tort and actionable as such, only if it is both actionable as a tort in this country as well as in the country where it was done. It is here we must be careful to consider two separate issues — jurisdiction and the choice of law, for they are logically distinct and separate. Windeyer J. in *Anderson* v. *Eric Anderson Radio & T.V. Pty. Ltd.*[6] puts the matter succinctly in this passage:

> "When in *Koop* v. *Bebb* this court spoke of 'the rule of private international law which defines the conditions of civil liability' in one State for an act done in another, the reference was not, as I read the judgment, merely to the entertaining of an action but also to the substantive law for determining liability in an action."

Once the cause of action is established, then it is a matter of determining the nature of the plaintiff's remedy which is partly procedural and partly substantive — the actual quantification of damages under the relevant heads being procedural; questions whether loss of earning capacity or pain and suffering are admissible heads of damage being questions of substantive law. I may as well add that the nature of the

plaintiff's remedy is to be determined by the *lex fori*. (See the speech of Lord Hodson in *Boys* v. *Chaplin*, *supra*, at pages 378, 379).

Accordingly our courts, following English practice, have jurisdiction in respect of foreign torts whenever we have jurisdiction *in personam* over the defendant. That is clearly stated in *Halsbury's* Laws of England, 4th edition, paragraph 406, page 308:

"In general, the English court has jurisdiction in actions in personam against any person who is present in England when the writ of summons or other originating process is served upon him. As a general rule the domicile, residence and nationality of the parties are all immaterial. In certain cases the court may make an order for substituted service, or for service outside the jurisdiction.

The parties may by their conduct give the English court a jurisdiction which it would not otherwise possess. By coming to the English court as a plaintiff, a person gives it jurisdiction over any counterclaim brought by the defendant. A writ is deemed to have been duly served on the defendant if he enters an unconditional appearance, or if his solicitor indorses on the writ a statement that he accepts service of the writ on his behalf. A contract may provide that the English court shall have jurisdiction over any action in respect of the contract, and may contain special provisions as to the mode and place of service."

See also Rule 20, Rule 21, *Dicey & Morris*, Conflict of Laws, 9th edition.

Section 23(1)(b) of the Courts of Judicature Act, 1964 is declaratory of this rule. It enacts (*inter alia*), that:

"... the High Courts shall have jurisdiction to try all civil proceedings where the defendant or one of several defendants resides or has his place of business ... within the local jurisdiction of the court..."

In my opinion, no difficulty arises in this case as to the High Court's jurisdiction over the appellants. The trouble starts when we consider the choice of law. It is here, in my view, the respondent has to establish both the conditions laid down in *Phillips* v. *Eyre*. *Dicey & Morris* in their Conflict of Laws, 9th edition, rule 178, supports this view; so also *Halsbury's* Laws of England, 4th edition, paras. 615-620.

I now turn to the present case. There is no doubt that the wrong done to the respondent is actionable here, but there is doubt that an actionable wrong by Indonesian law was committed in Samarinda, Kalimantan, Indonesia. No evidence was led to this point, and, indeed, there is not a scintilla of evidence directed to this issue. As it is, since the person who wishes to establish a claim in respect of a foreign tort must also show that it is actionable in the foreign country, he must fail in his claim if he leads no evidence on the point. The speech of Lord Hodson in *Boys* v. *Chaplin* (page 379) is in point:

"If it were clear that there existed in Malta in this case civil liability for the wrong done there would be no obstacle in the respondent's way, for in principle a person should in such circumstances be permitted to claim in this country for the wrong committed in Malta. This is to state the general rule as generally accepted which takes no account of circumstances peculiar to the parties on the occurrence. The existence of the relevant civil liability is, however, not clear in this case."

I would allow the appeal with costs here and below. It may be argued that this is a fit case for a re-trial. In my opinion, as the respondent has failed to prove his case, he cannot be allowed to have a second bite at the cherry.

Ali Ag. C.J. (Malaya) and **Wan Suleiman F.J.** concurred.

Appeal allowed.

Solicitors: *Baharuddin, Bernatt, Tan & Ker; Nair & Shee.*

TEH ENG KIM v. YEW PENG SIONG

[F.C. (Lee Hun Hoe Ag. L.P., Ali Ag. C.J. (Malaya), Raja Azlan Shah F.J.) January 14, 1977]

[Penang — Federal Court Civil Appeal No. 32 of 1976]

Family Law — Divorce — Custody of children — Permission to take children out of jurisdiction.

In this case the respondent (mother of the infant), applicant in the court below, had obtained a divorce on the grounds of the appellant's (her husband's) adultery. She applied for the custody of the children of the marriage and for permission to take the children to Australia. In her application she stated that she was intending to marry one Lawrie Howell, an Australian national. The husband, appellant, had committed adultery with the former wife of Lawrie Howell and she was living with him. The husband stated that he intended to marry her. Arulanandom J. held (1) normally the court would be reluctant to allow the children to be taken out of the jurisdiction but from the facts of this case it was apparent that if the children remained in Malaysia they would have to live with their stepmother for whom they decidedly had no affection; (2) in this case the welfare of the children could be best served if the applicant had custody, care and control of the children and was able to take them to Australia. On the appeal it was argued that while care and control of the children should be given to the respondent, custody should be given to the appellant as he wished to have a supervisory role of deciding the children's future and education. Alternatively it was argued that there should be an order for joint custody.

Held, dismissing the appeal: (1) there was nothing in this case to show that the learned trial judge had acted on wrong principles and therefore there were no grounds to show that his discretion had been wrongly exercised;

(2) in the circumstances a joint custody order was inappropriate;

(3) the learned trial judge was correct in holding that the parties had agreed that the net proceeds from the sale of the joint property should be equally divided between them.

Cases referred to:-

(1) *Jussa* v. *Jussa* [1972] 2 All E.R. 600.
(2) *H.* v. *H. and C.* [1969] 1 All E.R. 262.
(3) *Austin* v. *Austin* (1865) 35 Beav. 259, 263.
(4) *Kades* v. *Kades* (1965) 35 A.L.J.R. 251.
(5) *Re Orr* [1973] 2 D.L.R. 77.
(6) *J.* v. *C.* [1970] A.C. 668, 715.
(7) *P (L.M.)* v. *P. (G.E.)* [1970] 3 All E.R. 659, 662.
(8) *Gissing v. Gissing* [1970] 2 All E.R. 780, 788.
(9) *Fribance* v. *Fribance* [1957] 1 All E.R. 357, 360.

FEDERAL COURT.

Gan Teik Chee for the appellant.

S.J.D. Mathuram for the respondent.

In the court below, *S.J.D. Mathuram* appearing for the applicant and *G.C. Proctor* for the respondent, the following judgment was delivered on April 13, 1976:

Arulanandom J.: This was an application for custody of three children, Alban Teh, 15 years, Kathleen Josephine Teh, 10 years, and Bernard Antione Teh, 5 years, by the mother Yew Peng Siong, a teacher.